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No. 85-1765

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

BANKERS LIFE AND CASUALTY COMPANY,
Appellant,

v.

LLOYD M. CRENSHAW,
Appellee.

On Appeal from the Supreme Court of Mississippi

APPELLEE'S POST-ARGUMENT BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

I. By order dated December 14, 1987, the Court granted leave for Appellee to file a post-argument brief addressing the questions noted in Appellee's Conditional Motion For Leave To File Brief After Argument ("Cond. Motion"). The principal question is whether the federal Due Process Clause requires states to adopt more definite standards for fixing the amount of punitive damage awards in civil cases than the common law standards applied below. That procedural Due Process "standards" question was raised by the Court during oral argument. Transcript of Oral Argument at 30-41. It was never raised by Appellant at any stage of the proceedings below, and is not raised or fairly included in the questions presented to the Court.

II. On the merits, every federal court that has addressed the issue has ruled that even in *criminal* cases the federal Due Process Clause does not require definite sentencing standards. *A fortiori*, the common law standards Mississippi uses to guide jury discretion in awarding punitive damages do not violate the Due Process Clause.

ARGUMENT

I. THE DUE PROCESS STANDARDS QUESTION WAS NEVER PRESENTED BELOW.

The Due Process standards question is not before the Court for three reasons. First, that question was not raised in the court below. A *different* Due Process question was raised in Appellant's Brief on Appeal to the Mississippi Supreme Court, where Appellant argued that the "threat of unrestricted punitive damage awards" has a "chilling effect on the exercise of . . . [the] right of access to the courts." Jurisdictional Statement ("J.S.") 135a.

This "chilling access" claim is different from the "standards" claim raised during oral argument. States could adopt very definite standards—for example, that punitive damage awards cannot exceed 50% of a defendant's net worth, or cannot exceed 100 times the compensatory damages, or must be limited by a fixed cap of $2 million—and the permissible award could still be so large as to "chill" a defendant's desire to contest the underlying dispute. A court could resolve the "chilling access" question without considering the "standards" question. Thus, the "standards" question is not a mere enlargement of the "chilling access" question, and because it was not raised in the Mississippi Supreme Court, it is not before the Court. See *Dewey v. Des Moines*, 173 US 193, 198 (1899).

Second, Appellant did not raise either the "standards" question *or* the "chilling access" question at the trial level. Accordingly, the Mississippi Supreme Court did not con-

sider those questions, as it consistently refuses to consider foreseeable constitutional questions raised for the first time on appeal.[1] Accordingly, the Mississippi Supreme Court's refusal to consider those questions is an adequate and independent state ground that precludes review by this Court. See, *e.g.*, *Lynch v. New York*, 293 US 52, 54-55 (1934).

Third, neither question is raised or fairly encompassed in the questions presented to this Court. See Cond. Motion at 1-2, and authorities cited. In Question 1, Appellant argues that the award violates the Due Process Clause, but *only* "because it is vastly out of proportion to any penalties provided by the Mississippi legislature for similar or analogous improper business activities," or "because it was imposed under a [substantive] standard of conduct newly formulated by the court below and applied retrospectively." [2]

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[1] Mississippi Supreme Court Rule 6(b). See cases cited in Brief of Appellee at 26, n.37; *Smith v. Fluor*, 514 So.2d 1227 (Miss. 1987); *Witt v. Mitchell*, 437 So.2d 63, 66 (Miss. 1983); *Stewart v. City of Pascagoula*, 206 So.2d 325, 328 (Miss. 1968). *Town of Madison v. Bear Creek Water Ass'n*, 510 So.2d 800 (Miss. 1987), and *Griffin v. Mississippi*, 504 So.2d 186 (Miss. 1987), are not contrary. In *Town of Madison, both* parties asked the court to consider the new issue, and it was not a constitutional issue. *Griffin* is consistent with a recognized but narrow exception to the general rule, which allows criminal defendants to raise on appeal constitutional issues involving errors committed during trial even though the defendant failed to make a contemporaneous objection. See *Taylor v. State*, 452 So.2d 441, 450 (Miss. 1984).

[2] Brief of Appellant, at i. Neither of *these* Due Process claims was raised in the court below. In its Petition for Rehearing, Appellant made a "change of law" argument, but based that argument solely on the Equal Protection Clause. J.S. 138a.

II. THE STANDARDS EMPLOYED BELOW FOR FIXING AND REVIEWING THE PUNITIVE DAMAGE AWARD SATISFY THE REQUIREMENTS OF THE FEDERAL DUE PROCESS CLAUSE.

The requirements of due process vary depending upon the practice under review. More protective procedures are required if the action is criminal rather than civil, or if the interest involved is life or liberty, rather than property. See *Parratt v. Taylor*, 451 US 527 (1981). Punitive damages implicate a property interest, and always have been considered civil. As far as Appellee is aware, no court has ever applied *any* of the procedural safeguards required in criminal prosecutions to punitive damage awards.[3] Accordingly, the Due Process Clause permits less protective procedures in the context of punitive damages than in the context of criminal sentencing. As we will show, however, Mississippi's standards for fixing and reviewing the amount of punitive damage awards satisfy even the due process requirements for *criminal* sentencing.

The Due Process Clause places some limits on criminal sentencing, but it does *not* require fixed or definite sentencing standards. The limits it *does* place on criminal sentencing demonstrate *a fortiori* that Mississippi's punitive damages law provides due process. Thus, a sentence may not be based on illegal considerations, *United States v. Lemon*, 723 F.2d 922 (DC Cir. 1983), on an error of fact, *United States v. Tucker*, 404 US 443 (1972), or on vindictiveness. *North Carolina v. Pearce*, 395 US 711 (1969). When the amount of punishment is discretionary, the defendant is entitled to have the sentencer exercise its

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[3] See, to the contrary, *Hansen v. Johns-Manville Products Corporation*, 734 F.2d 1036, 1042 (5th Cir. 1984), *cert. denied*, 470 US 1051 (1985); *McDermott v. Kansas Public Service Co.*, 238 Kan. 462, 712 P.2d 1199, 1203 (1986); *Brotherton v. Celotex Corp.*, 202 N.J. Super. 148, 493 A.2d 1337, 1344-45 (1985); see *generally United States v. Ward*, 448 US 242 (1980). Appellant did not risk incarceration, loss of voting rights, or other consequences of criminal conviction.

discretion in fixing sentence. See, *e.g.*, *Gregg v. Georgia*, 428 US 153, 189 (1976), citing *Pennsylvania ex rel. Sullivan v. Ashe*, 302 US 51, 55 (1937). Such requirements protect a defendant's due process right to a non-arbitrary sentence even when there are no precise standards for fixing punishment. Defendants do not have a due process right to know the exact punishment for wrongdoing.[4]

In fact, state laws typically set a very wide range of punishment for a given offense,[5] and judges have almost

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[4] Due process requirements for imposing criminal *liability* mandate far more definite standards than are required for fixing sentence once guilt is determined. Due process requires states to make explicit the nature of the substantive conduct they wish to criminalize. See, *e.g.*, *Baggett v. Bullitt*, 377 US 360 (1964). Specificity concerning the substantive offense is required so that individuals can conform their conduct to the law, and so that the substantive law will not "encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 US 352, 356 (1983). These interests are far less relevant to the process of criminal *sentencing*, or of fixing the *amount* of a punitive damage award.

In criminal cases the sentencer fixes punishment only after guilt has already been determined under constitutionally adequate standards. Similarly, the jury fixes the amount of punitive damages only if liability for actual damages is established *and* the judge and jury both determine that the evidence warrants punitive damages under well-established liability standards that are not at issue here. See *State Farm v. Simpson*, 477 So.2d 242, 252 (Miss. 1985).

[5] Criminal sentencing provisions typically set an upper limit within which a penalty must be fixed. Mississippi's punitive damages law does not prescribe a precise monetary "cap." The distinction is without relevance. The "cap" in many criminal statutes is so high, and the range of permissible sentences so broad, that there is effectively no limit. In capital cases, of course, the upper limit is death. In non-capital cases, there is often an enormous range of permissible sentences for the same substantive offense. For example, under the newly enacted federal sentencing law, a Class A Felony is punishable from no incarceration to life imprisonment. 18 U.S.C. § 3581(b). Moreover, there *is* a limit on punitive damages under Mississippi law. The law requires that the net worth of the defendant be considered, and an award that, for example, equalled a defendant's net worth would violate Mis-

unreviewable discretion in fixing sentence. *Wasman v. United States*, 468 US 559 (1984); *United States v. Tucker*, 404 US 443 (1972). Appellee is aware of *no* case holding that a law establishing a broad range of permissible sentences, or granting unguided discretion to the jury to set a sentence within that range, violates due process. To the contrary, due process challenges to standardless jury sentencing have been universally *rejected*. See *Garcia v. United States*, 769 F.2d 697, 699 & n.1 (11th Cir. 1985); *R.G. Britton v. Rogers*, 631 F.2d 572, 578-581 (8th Cir. 1980), *cert. denied*, 451 US 939 (1981); *Vines v. Muncy*, 553 F.2d 342, 347-348 (4th Cir.), *cert. denied*, 434 US 851 (1977). *Cf. Stevens v. Armontrout*, 787 F.2d 1282, 1284 (8th Cir. 1986) (upholding against due process challenge a 200 year bench sentence under a statute that permitted sentence between ten years and "any number of years"). As this Court has noted in *dicta*, "legislatures [are] free to decide how much discretion in sentencing should be reposed in the judge or jury in noncapital cases." *Lockett v. Ohio*, 438 US 586, 603 (1978) (plurality opinion). See also *Solem v. Helm*, 463 US 277, 290 (1980), referring to the

> broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals.[6]

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sissippi law. In contrast, criminal fines often *exceed* the defendant's net worth, but have never been found to violate the Due Process Clause for that reason. In any event, the award at issue here was only one-half of one percent of Appellant's net worth.

[6] *Giaccio v. Pennsylvania*, 382 US 399 (1966), is not contrary. There the Court found violative of due process a law allowing juries to punish criminal defendants for "reprehensible" conduct even when the defendant was *not guilty* of the charged offense. Because that was tantamount to fining defendants for "reprehensible" conduct without defining "reprehensible," the Court found the law unconstitutionally vague. The Court noted, however, that it "intend[ed] to cast no doubt whatsoever on the constitutionality

Only in the context of capital sentencing has the Court ruled that guided discretion is constitutionally required. Even in that context, however, the Court has based the requirement on the Eighth Amendment and the unique characteristics of capital sentencing. *Gregg v. Georgia*, 428 US 153 (1976). The Court has explicitly declined to extend that holding to other types of criminal sentencing, see *Lockett v. Ohio*, 438 US 586, 603 (1978), or to base such a right in the Due Process Clause. See *McGautha v. California*, 402 US 183, 185, 190 (1971) (capital sentencing scheme which gave juries "absolute discretion," and provided "no standard for the guidance of the jury," did *not* violate the Due Process Clause).

Except in capital sentencing, most states employ standardless discretionary sentencing schemes because they permit flexibility, which is a valued component of sentencing determinations. Thus, most states allow the sentencer to consider without limitation or guidance all of the particular circumstance of the offense and the offender in fixing punishment.[7]

Moreover, although criminal sentencing provisions do not violate the Due Process Clause even if they are entirely standardless, Mississippi's punitive damages law *does* guide jury discretion in fixing punitive damage awards, and provides standards for trial and appellate review of such awards. Under Mississippi law, once it has been determined that punitive damages in some amount are permissible, jurors are instructed—as they were in this case without objection—that the amount is to be determined by considering the nature of the offense,

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of the settled practice of many States to leave to juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits." *Id.* at 405 n.8.

[7] See generally *Woodson v. North Carolina*, 428 US 280, 303-305 (1976), and cases cited. For capital sentencing, individualized sentencing is constitutionally *required* under the Eighth Amendment. *Id.*

the need to punish the defendant, and the need to deter the defendant and others from similar conduct in the future, taking into consideration the financial worth of the defendant.[8] See *Bankers Life & Casualty Co. v. Crenshaw*, J.S. 49a-52a. Although those standards leave the jury considerable discretion, this Court has always considered such discretion not only constitutionally permissible, but wise.[9]

A jury's punitive damage award serves another socially valuable purpose. A jury "express[es] the conscience of the community." *Witherspoon v. Illinois*, 391 US 510, 519 (1968). See also *Gregg v. Georgia*, 428 US 153, 181 (1976) (sentencing decisions of juries are "a significant and *reliable objective index* of contemporary values") (emphasis added). That those community values cannot be reduced to a precise formula either in criminal sentencing or in fixing punitive damage awards is not a vice, but a virtue of the jury system:

> [T]he inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgments that defy codification and that "buil[d] discretion, equity and flexibility into a legal system."

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[8] Similar standards prevail in nearly every state that authorizes punitive damage awards. See Restatement (2nd) Torts, § 908 (1979); Annotation, Excessiveness Or Inadequacy Of Punitive Damages In Cases Not Involving Personal Injury Or Death, 35 ALR 4th 538.

[9] See *Day v. Woodworth*, 13 How. 363, 371 (1851) (noting, with approval, that punitive damage awards had "been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the particular circumstances of each case"); *Missouri Pacific Ry. Co. v. Humes*, 115 US 512, 521 (1885) ("the discretion of the jury in [fixing punitive damages] is not controlled by any very definite rules; yet the wisdom of allowing such additional damages to be given is attested by the long continuation of the practice"). Both of these cases are cited with approval in *Smith v. Wade*, 461 US 30, 35 n.3 (1983).

McClesky v. Kemp, —— US ——, ——, 95 L.Ed.2d 262, 291 (1987) (citation omitted).[10]

Moreover, in Mississippi, trial courts and the Supreme Court will reduce or vacate punitive damage awards if they are excesive in light of those standards, or if the jury lacked adequate information to apply those standards.[11]

Finally, a ruling that the Due Process Clause requires more definite standards for fixing punitive damage awards than the common law requires would have enormous consequences. Such a ruling would invalidate the punitive damages law in the majority of states and under federal law. It would also constitutionalize the ongoing policy debate as to the wisdom of fixed versus discretionary sentencing schemes, and would inevitably draw into question the constitutionality of criminal sentencing provisions in states that have chosen discretionary sentencing schemes.

Moreover, such a ruling would effectively require the Court to scrutinize every criminal sentence and every civil penalty to determine whether the process for fixing the penalty was sufficiently guided to satisfy due process.

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[10] As noted *supra*, the Due Process Clause does not give a wrongdoer the right to know with certainty the cost of his misconduct. See *Smith v. Wade*, 461 US 30, 50 (1983). Here appellant mistakenly thought it knew the cost of its intentional misconduct, and made a business decision that such a cost was worth the risk. See J.S. 47a, 19a; Record 1243-44; Brief of Appellee, at 4.

[11] See, *e.g.*, *Snowden v. Osborne*, 269 So.2d 858, 861 (Miss. 1972) (reversing punitive damage award because record was silent on defendant's worth); *Mutual Life Ins. Co. v. Wesson*, —— Miss. —— (Nov. 12, 1987) (holding that a punitive damage award of $8 million was "excessive after applying the established standards," and ordering remittitur of $6.5 million) (slip op. at 18-19). *Wesson* relied on Miss. Code Ann. Sec. 11-1-55, which authorizes remittitur of "excessive" awards, or awards "influenced by bias, prejudice, or passion" or "contrary to the overwhelming weight of credible evidence."

CONCLUSION

The Court should not address the Due Process standards question, which is not before the Court. Alternatively, the Court should rule that the Due Process Clause was not violated by the award in this case.

Respectfully submitted,

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